



Failure To Demonstrate a Consistent Pattern of Reasonable Care and Competence and Technical Knowledge and Skill; Rendering Professional Services When Judgment Could Be Affected by Member's Own Interests

Summary

The National Ethics Council (“Council” or “NEC”) ruled that an AIA Member violated Rule 1.101 of the Institute’s 2004 Code of Ethics and Professional Conduct (“Code”) by designing a single-family residence for the Complainant and his wife that did not meet the Complainant’s objectives and by failing to confirm with the Complainant, as well as his wife, any revisions to those objectives. The Council also ruled that the Member, who began an affair with the Complainant’s wife during the project, violated Rule 3.201 of the Code by neither resigning from the project nor disclosing his conflict to the Complainant. The Council found no violation of Rule 2.104 or Rule 3.103. The NEC imposed the penalty of a two-year suspension of membership.

All initials, names, dates, places, and gender references in this decision have been changed.

References

2004 Code of Ethics and Professional Conduct, Canon I, General Obligations

Rule 1.101 In practicing architecture, Members shall demonstrate a consistent pattern of reasonable care and competence, and shall apply the technical knowledge and skill which is ordinarily applied by architects of good standing practicing in the same locality.

Commentary: By requiring a “consistent pattern” of adherence to the common law standard of competence, this rule allows for discipline of a Member who more than infrequently does not achieve that standard. Isolated instances of minor lapses would not provide the basis for discipline.

2004 Code of Ethics and Professional Conduct, Canon II, Obligations to the Public

Rule 2.104 Members shall not engage in conduct involving fraud or wanton disregard of the rights of others.

Commentary: This rule addresses serious misconduct whether or not related to a Member’s professional practice. When an alleged violation of this rule is based on a violation of the law, or of fraud, then its proof must be based on an independent finding of a violation of the law or a finding of fraud by a court of competent jurisdiction or an administrative or regulatory body.

2004 Code of Ethics and Professional Conduct, Canon III, Obligations to the Client

Rule 3.103 Members shall not materially alter the scope or objectives of a project without the client’s consent.



*2004 Code of Ethics and Professional Conduct,
Canon III, Obligations to the Client*

Rule 3.201 A Member shall not render professional services if the Member's professional judgment could be affected by responsibilities to another project or person, or by the Member's own interests, unless all those who rely on the Member's judgment consent after full disclosure.

Commentary: This rule is intended to embrace the full range of situations that may present a Member with a conflict between his interests or responsibilities and the interests of others. Those who are entitled to disclosure may include a client, owner, employer, contractor, or others who rely on or are affected by the Member's professional decisions. A Member who cannot appropriately communicate about a conflict directly with an affected person must take steps to ensure that disclosure is made by other means.

Findings of Fact

The Complainant is a physician who lives and has a medical practice in the Midwest. He and his wife were the clients of ABC Architects for the design of a retirement home in the Southwest ("Project").

The Respondent is an architect and the owner of ABC Architects and served on the Project in the role of design architect and principal-in-charge. For the last ten years, approximately 90 percent of his practice has been the design of custom homes. He continues today to practice through ABC Architects.

The Project was to have been a retirement home for the Complainant and his wife on 25 acres of land in the mountains. The couple had become

familiar with the area while their daughter was enrolled in a nearby college. They began looking for land in the summer of 2004 and closed on their property on February 2, 2005. That same month, they retained the Respondent to design their home.

In the initial stages of the design, the couple provided specific design input to the Respondent, some of which was detailed in "Design Input Forms" created by the Respondent. On at least two separate occasions, the couple stated their desire for a retirement home of approximately 3,300 to 3,500 square feet. In addition, the Complainant stated that they requested a retirement home "costing about \$500,000 to build." More specifically, in a Design Input Form, they informed the Respondent that their budget was \$375,000 to \$425,000. They also requested that the construction be completed by November or December 2005 so that they could move in by Christmas.

The Respondent prepared an "Agreement Between Owners & Architect" using his own form of agreement, inserted the provision "an approximately 3,500 square foot home," and signed the Agreement on February 28, 2005. This took place even prior to having received the completed Design Input Form stating "3,300 – 3,500 sq feet" several days later. The same Agreement excludes cost estimating as a basic service but does include references to designing to a budget. The Agreement provides that the couple would pay the Respondent on the basis of hourly rates for basic as well as additional services.

On April 11, 2005, the Respondent presented to the couple an initial Schematic Design dated April 9, 2005 for a retirement home consisting of more than 7,000 square feet. This figure does not include the porches, breezeway, and detached garage that were also planned. The following day, the couple met again with the Respondent and requested that he reduce the project scope because the design was, in the Complainant's words, "way too big," "way too expen-



sive,” and they had “to really decrease the scope and expense of this house.” The Respondent apparently never discussed with the couple the cost per square foot that could be expected even though he knew it would likely cost at least \$125 per square foot.

The Respondent then made relatively minor design changes to reduce the project scope. He prepared further Schematic Designs dated April 24, 2005 and then May 4-5, 2005, each consisting of more than 6,300 square feet (not counting porches and terraces, breezeway, and garage). These were reviewed with the Complainant’s wife and the May drawings were provided to the couple’s General Contractor for pricing. The May plans are very similar to the final construction plans ultimately prepared by the Respondent.

In June 2005, the Complainant and his wife initially applied for a construction loan of about \$650,000 for the Project. The General Contractor’s initial cost estimate was approximately \$840,000, however, and his first itemized estimate was in excess of \$871,000. The couple expressed their shock to the Respondent and requested that “cuts” be made in order to reduce the price. The Complainant felt that the Project was “totally out of control.” In August 2005, the couple applied to increase their construction loan to \$700,000. The Complainant understood that the Respondent would redesign the house so that it could be built for that amount.

The General Contractor began excavation in August 2005, and the foundations were placed by the end of October. Framing began in November. The Respondent did not finish the construction drawings, however, until December 30, 2005. Up until that time, the General Contractor was using preliminary plans for construction.

By mid-September 2005, the Respondent and the Complainant’s wife had begun a romantic relationship. On November 20, 2005, she admitted the relationship to her husband. The couple have since divorced, and as of the date of the

hearing she was engaged to be married to the Respondent.

At the hearing, the Complainant testified that, had he known about the relationship between his wife and the Respondent before construction was well underway, he might have made the decision to stop design and construction of the Project and sell the property. Instead, following the divorce, he still owned the Project and had financial responsibility for it.

As of the date of the hearing, two years after construction began, the Project remained incomplete and unoccupied. The Respondent’s final construction drawings show a house with 6,185 square feet of heated living area plus 2,087 square feet of porches and a 1,140 square foot detached garage. The General Contractor testified that the construction cost has exceeded \$1 million.

Conclusion

Rule 1.101

Rule 1.101 provides:

In practicing architecture, Members shall demonstrate a consistent pattern of reasonable care and competence, and shall apply the technical knowledge and skill which is ordinarily applied by architects of good standing practicing in the same locality.

The Commentary to this rule states: “By requiring a ‘consistent pattern’ of adherence to the common law standard of competence, this rule allows for discipline of a Member who more than infrequently does not achieve that standard. Isolated instances of minor lapses would not provide the basis for discipline.”

The Complainant alleges that the Respondent violated Rule 1.101 by designing a house that far exceeded the client’s initial wishes with respect



to scope and budget. Further, the Respondent failed to obtain consent from both of his clients, husband and wife, for the increased Project scope and budget.

Both the documentary evidence and the Respondent's own testimony demonstrate that the Respondent was aware of the intended project scope and budget from the outset. The couple's original directions to the Respondent were for a home of approximately 3,500 square feet at a cost ranging from \$375,000 to \$425,000. After being presented with initial design drawings, the couple later increased their budget to \$650,000 and then \$700,000, and they informed the Respondent of that. In spite of this budget, the cost of the Project as designed by the Respondent was first estimated by the General Contractor to exceed \$871,000 but ultimately cost in excess of \$1 million.

Over the course of the design process, the Respondent made only minor reductions to the size of his initial design, while being advised that significant changes to reduce scope and budget were necessary. The Respondent further failed to confirm—with both of his clients—that they both agreed to change their expectations about the size and cost of the Project.

The Respondent was also aware of the couple's desired Christmas 2005 occupancy date from the outset. The evidence does not show that the Respondent took into account the project schedule requested by his clients, nor does it show that he informed them of the unreasonableness of their desired schedule. The Respondent's architectural firm and his consulting engineers were unable to complete the construction documents until December 30, 2005, approximately a week after the couple's desired occupancy date. The final structural engineering drawings were provided to the General Contractor after the footings and foundations, as well as some of the framing, had already been completed.

It is true that the Complainant's wife acknowledged that she reviewed design work as it pro-

gressed and made numerous design changes, which could have affected the Project's schedule. The floor plans remained almost unchanged after May 5, 2005, however.

An architect applying professional skills would have confirmed with both of his clients that they agreed to the much larger and more costly design and to the extended schedule. Particularly in light of the Respondent's personal relationship with the Complainant's wife, he cannot justify his decisions on the Project as having been made in response to directions that she alone gave.

The National Ethics Council concludes, although not unanimously, that the Respondent violated Rule 1.101 by (a) designing a home far in excess of the written objectives of his clients and (b) failing to confirm that both the Complainant and his wife had agreed to revise their objectives for scope, budget, and schedule. The Council concludes that this conduct constitutes a failure to demonstrate a consistent pattern of reasonable care and competence in the delivery of services and a failure to apply the technical knowledge and skill which is ordinarily applied by architects of good standing doing similar projects

Rule 2.104

Rule 2.104 provides:

Members shall not engage in conduct involving fraud or wanton disregard of the rights of others.

The Commentary to this rule states: "This rule addresses serious misconduct whether or not related to a Member's professional practice. When an alleged violation of this rule is based on a violation of the law, or of fraud, then its proof must be based on an independent finding of a violation of the law or a finding of fraud by a court of competent jurisdiction or an administrative or regulatory body."



The Complaint alleges that the Respondent engaged in conduct involving both fraud and wanton disregard for the rights of Complainant. Because the Complainant has not shown that a court or administrative or regulatory body has made a finding of fraud, a violation of this rule cannot be based on fraud in this case. (*See Rule 2.104, Commentary.*)

A violation of this rule may, alternatively, be based on conduct involving the wanton disregard of the rights of others. The NEC has previously described “wanton disregard” under this rule to be an action taken in disregard of a “high degree of risk that the Complainant would be adversely affected” and that risk “is apparent or would be apparent to a reasonable person.” (*See NEC Decision 2005-15.*)

The Complainant claims that the Respondent acted in wanton disregard of the Complainant’s rights by continuing to work on the Project after he had begun an affair with the Complainant’s wife. The National Ethics Council does not conclude that the Respondent’s romantic relationship with the Complainant’s wife constitutes a violation of Rule 2.104.

The Council has also considered whether the Respondent’s conduct with respect to Project scope and budget as described in the analysis of Rule 1.101 would constitute wanton disregard of the Complainant’s rights. The Respondent has acknowledged that he owed a duty and professional obligations to both of his clients. As the Council concluded under the analysis of Rule 1.101, the Respondent designed a home far in excess of the Complainant’s written objectives.

However, the Complainant took positive action in support of a project exceeding the initial budget by applying for a construction loan well in excess of his original budget and by making other decisions as the Project progressed to fund a larger scope. The Complainant could have decided to stop the larger and more costly Project, but he did not. As a result, the Council concludes that the Complainant has not shown that

the Respondent’s conduct related to the Project’s budget and scope was in wanton disregard of the Complainant’s rights.

The National Ethics Council concludes that the Complainant did not meet his burden to prove that the Respondent violated Rule 2.104.

Rule 3.103

Rule 3.103 provides:

Members shall not materially alter the scope or objectives of a project without the client’s consent.

The Complainant alleges that Respondent materially altered the scope of the Project without the Complainant’s consent.

The analysis of the Project scope and budget under Rule 2.104 also applies to this rule. Although the Respondent designed a home far in excess of the Complainant’s initial written objectives, the Complainant made decisions as the Project progressed to fund the larger scope.

The National Ethics Council concludes that the Complainant did not meet his burden to prove that the Respondent violated Rule 3.103.

Rule 3.201

Rule 3.201 provides:

A Member shall not render professional services if the Member’s professional judgment could be affected by responsibilities to another project or person, or by the Member’s own interests, unless all those who rely on the Member’s judgment consent after full disclosure.

The Commentary to this rule states: “This rule is intended to embrace the full range of situations that may present a Member with a conflict between his interests or responsibilities and the interests of others. Those who are entitled to dis-



closure may include a client, owner, employer, contractor, or others who rely on or are affected by the Member's professional decisions. A Member who cannot appropriately communicate about a conflict directly with an affected person must take steps to ensure that disclosure is made by other means."

The Complainant alleges that the Respondent rendered services to the Complainant when he knew those services and his professional judgment were affected by his affair with the Complainant's wife. Further, he did not disclose to the Complainant that he was having the affair, nor did he resign from the Project.

The Respondent has acknowledged that his personal relationship with the Complainant's wife began by mid-September 2005. As previously noted, the Respondent's work on the Project's construction documents continued until December 30, 2005. (The initial Schematic Design drawings were completed April 9, 2005.) The Respondent billed the Complainant for thousands of dollars worth of services provided from September through December 2005, even after the affair had begun.

The Respondent testified that he did not find out until early February 2006 that the Complainant's wife had told her husband on November 20, 2005 about their affair. The Respondent also testified that he never informed the Complainant of the affair. As a result, as far as the Respondent knew, the Complainant was not aware of the Respondent's relationship with the Complainant's wife at any time while the Respondent was providing and billing for services on the Project.

The Respondent testified that his professional judgment had not been clouded by his affair with the Complainant's spouse. Nonetheless, the Respondent never provided a full disclosure, never took steps to provide a disclosure to the Complainant, and never resigned from the Project. At the hearing, the Respondent acknowledged that the Complainant might well have de-

ecided not to proceed with the Project if he had learned of the affair.

The National Ethics Council concludes that the Respondent violated Rule 3.201. The Respondent's personal relationship with the Complainant's spouse certainly could have affected his professional judgment while rendering professional services. The Respondent should have taken actions to disclose his conflict or resigned from the Project. He chose to do neither.

Penalty

Having found violations of Rules 1.101 and 3.201 of the Code of Ethics and Professional Conduct by the Respondent, the National Ethics Council must determine an appropriate penalty.

The following factors should be considered in the assessment of this penalty:

- The Respondent was fully aware of the owners' initial desires for a retirement home much smaller in square footage and much less expensive than the one he designed and was ultimately constructed.
- The Respondent was fully aware of the owners' initial desires for an occupancy date much earlier than the actual completion, and the delay was caused in part by his own actions or inactions.
- The Respondent was experienced in the design of custom homes and had worked with many clients. Despite the fact that the home he designed exceeded the size and the budget stated by both of his clients, the Respondent failed to ensure that the Complainant as well as the Complainant's wife wished to modify the scope and budget prior to proceeding with services.
- The Respondent testified that he never informed the Complainant of his affair with the Complainant's spouse, and that the



reason was that the affair did not compromise his professional judgment. Nonetheless, the Respondent also testified that if the Complainant had been made aware of the affair he could have made a decision whether or not to proceed with the Project.

After careful consideration of the case and violations of the referenced Rules, the National Ethics Council imposes a suspension of membership for a period of two years.

Dissenting Opinion

The Dissenting Minority of the NEC finds that the Complainant has not proven a consistent pattern of substandard performance by the Respondent and therefore has not proven a violation of Rule 1.101. The Complainant alleges that the Respondent fell short with respect to budget, schedule, responsiveness to the contractor, and by continuing work on the Project after starting an affair with the Complainant's wife.

Budget

The initial client survey of February 2005 clearly states that the project budget is "uncertain/flexible," then includes a question mark after an apparent guess in the \$400,000 range. Although alleging that he directed the Respondent to design to such a budget, the Complainant himself provided substantial evidence to the contrary.

At the hearing, the Complainant asserted that, at his first design meeting with the Respondent, he and his wife were in a "dream" phase, discussing the house without respect to budget or size, and that it was the architect's office who warned them that this approach would require an increase in scope over their initial guesses. Later at the hearing, the Complainant responded to a question about his contract with the Respondent as follows:

Q: [T]he third paragraph's first sentence says: "The initial budget for the project is to be determined." At the time of entering into that agreement, was it your understanding that the architect was going to design . . . to a specific budget?

A: We had not agreed on that, no.

Neither party has disputed the substantial evidence that the Respondent relied on early estimates from the Complainant's contractor and participated in collaborative budget discussions with him and the Complainant's wife. These facts are consistent with a common design approach sometimes called "value engineering," in which a client starts by asking to see what the "dream" or "wish list" would involve, then works backward with the contractor and/or architect to bring costs to an acceptable level.

Costs were apparently at a level acceptable to the Complainant by the summer of 2005. At that time, a firm estimate was in his hand, and an e-mail between his wife and the Respondent on June 23, 2005 states that the Complainant had knowledge of the \$871,550 contractor estimate, had applied for a \$700,000 construction loan, and planned to pay the difference out-of-pocket.

These facts are incompatible with the allegation that the Complainant did not participate in nor approve the Project budget. (The statement that the house eventually cost more than \$1,000,000 is outside the purview of this case because ultimately the Complainant himself took over the Project and further increased spending on the house while the Respondent was excluded from participating.)

Schedule

The Complainant claimed at the hearing that the Respondent promised he would be in the new house by Christmas of 2005. Substantial evidence undermines this assertion. For example, the Complainant's wife claimed just the oppo-



site: that the notion of having a family Christmas in the completed house in 2005 was hers alone and that the entire project team, including her husband and the Respondent, teased her about the unfeasibility of this idea. The credibility of her statement is supported by and consistent with an e-mail she sent the Respondent on June 23, 2005.

Furthermore, her June 23 e-mail also shows that the Complainant had an early understanding of the design process as a year-long phase. In his own testimony, in fact, the Complainant asserted that the reason he decided not to get competitive bids for his house is that the design process takes “a year” and so he was cutting the schedule where he could.

The contractor also testified that he made clear to the couple that a Christmas deadline was impossible as soon as he saw the project. Moreover, any building professional would know that it is nearly impossible to start a design of a large house in the spring and finish construction by Christmas, rendering unlikely that an architect would promise such a feat.

Responsiveness to the Contractor

The contractor himself generally did not fault the architect for delays in the construction schedule. The contractor stated that he had a final drawing set by December 2005, not the spring of 2006 as the Complainant alleged. In addition, the contractor testified that he nearly always had the architectural drawings he required for the work he was currently doing on site. He cited one instance when he did not have a necessary drawing—a diagram for plugs in the concrete floor—and he received it the following day. Moreover, there is no evidence of unanswered requests directed to the Respondent by either the contractor or the Complainant.

Relationship with the Complainant’s Wife

The Respondent’s handling of his affair with the Complainant’s wife would constitute a violation

of Rule 1.101 only if that conduct had an effect on the technical knowledge and skill or care and competence that the Respondent applied to the Project. The Dissenting Minority agrees with the Majority that Rule 3.201 provides the appropriate basis for evaluating this conduct by the Respondent.

Conclusion

The Majority of the NEC has argued that the Respondent consistently fell short of a reasonable standard of care because an “architect applying professional skills would have confirmed with both of his clients that they agreed to the much larger and more costly design and to the extended schedule.” As stated above, there is substantial evidence, including testimony from the Complainant himself, that contradicts the idea that he disapproved of or was unaware of the Project cost and schedule. Moreover, the Respondent testified that he communicated directly with the Complainant on these issues. The Dissenting Minority would find that the Complainant has not proven a violation of Rule 1.101.

Members of the National Ethics Council

Bill D. Smith, FAIA, Chair
Victoria Beach, AIA
Janet Donelson, FAIA
Melinda Pearson, FAIA
Michael L. Prifti, FAIA
Kathryn T. Prigmore, FAIA

The Hearing Officer, A.J. Gersich, AIA, did not participate in the decision of this case, as provided in the Rules of Procedure.

March 20, 2009